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NO. 88-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner

v.

FRANK S. ZOLIN, ET AL,
Respondents

BRIEF OF BERNARD M. BARRETT, JR., M.D. AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Bernard M. Barrett, Jr., M.D., the petitioner in *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988), *pet. for cert. pending*, No. 87-1705, has an interest in this case that is representative of the interests of the ever increasing number of taxpayers who are made targets of administrative criminal tax investigations by the I.R.S. Of the administrative criminal tax investigations the I.R.S. conducts, only about one-third are referred to the Justice Department for criminal prosecution. 1982 Comm'r and Chief Couns. Ann. Rep. 15. Therefore, approximately two-thirds of the taxpayers who are subjected to the administrative investigation techniques of the Criminal Investigation Division of the I.R.S. do not have prosecution recommended against them and are never prosecuted. One of the techniques utilized in I.R.S.

administrative criminal investigations of taxpayers, such as used in *Barrett*, is the mass mailing of information solicitations, known as "circularization letters," to a doctor's patients, a lawyer's clients, a business's customers or a taxpayer's relatives. Since the I.R.S. discloses in such circularization letters the fact that the doctor, lawyer, businessman or other taxpayer is under criminal investigation, the potential for harm to the taxpayer's reputation is substantial. Revealing that a taxpayer is under criminal investigation is an unnecessary disclosure of statutorily protected "return information." Section 6103(b)(2)(A).[1] The district court in a summons enforcement proceeding should have the power to conditionally enforce a summons to prevent such an improper disclosure and violation of the taxpayer's confidentiality rights.

The Handbook for Special Agents discusses the use of circularization letters and provides that "caution must be exercised not [to] damage the reputation of the taxpayer by making [such letters] either offensive or suggestive of any wrongdoing by the taxpayer." See 5 CCH Internal Revenue Manual ¶ 9781, Handbook for Special Agents (Circular Form Letter), ch. 347, 347.2, at 28,691.

It is significant to note that chapter 347.2 of the Handbook for Special Agents was supplemented on July 7, 1988, to add the sentence "It *must not* be disclosed in the body of the letter that the taxpayer is under investigation by the Criminal Investigation Division." (Emphasis in the original.) The special agent's mass circularization letter in *Barrett* included such improper statement and the special agent's desire to continue mail-

1. All references to "Sections" are to the Internal Revenue Code of 1986, Title 26, United States Code, unless otherwise noted.

ing such letters with the aid of the summoned information is inconsistent with the I.R.S.'s own admission that the inclusion of such "return information" is improper. Because the Handbook for Special Agents recognizes that the inclusion of such "return information" in circularization letters is improper, it is incongruous for the government to argue that a court must blindly enforce a summons for the I.R.S. to be able to continue mailing mass circularization letters that improperly include such "return information."

The Handbook for Special Agents also provides, immediately after the chapter regarding circularization letters, instructions about the strictly limited situations where disclosures of "return information" are permitted to be used, including the specific instruction that Section 6103(k)(6) only authorizes investigative disclosures "to the extent necessary to gather data which may be relevant to a tax investigation." 5 CCH Internal Revenue Manual ¶ 9781 (Disclosure), ch. 348, 348.3 at 28,691-28,691-2. Furthermore, I.R.S. Policy Statement P-9-29 (Investigative Policy) provides that ". . . unnecessary embarrassment to the taxpayer should be avoided" and I.R.S. Policy Statement P-9-35 (Legal Rights of Persons Investigated to be Observed) provides that "[t]he methods which the Service will use . . . will in all respects stay within the bounds of the law." 1 CCH Internal Revenue Manual (Policies of the I.R.S. Handbook - Criminal Investigation) pp. 1305-59-60. At Internal Revenue Manual § 9382.1(4), a special agent conducting an administrative criminal investigation is instructed to be "discreet" and that "he/she must not unnecessarily injure the reputation of the person being investigated." 5 CCH Internal Revenue Manual ¶ 9382 (Conduct Standards for Special Agent During Investigations), p. 28,211.

Although the Internal Revenue Manual in these various places recognizes and re-emphasizes the importance of not harming taxpayers' reputations nor violating Section 6103 via circularization letters or otherwise, the government inconsistently argues to this Court that a pre-disclosure remedy preventing the improper use of circularization letters or other violations of Section 6103 would "stand . . . on its head" the voluntary assessment nature of this country's system of taxation. (Govt's brief, p. 36.) To the contrary, not allowing a pre-disclosure remedy preventing the improper use of circularization letters or other violations of confidentiality rights of taxpayers will necessarily cause taxpayers to become less willing to voluntarily turn over their book and records and more apt to force the I.R.S. to file summons enforcement cases to obtain such records, thereby causing a greater administrative burden upon the I.R.S. and the courts.

The government has failed to acknowledge or even address the fact that the pre-disclosure remedy sought by Dr. Barrett would not prevent the I.R.S. from obtaining or using any information from the taxpayer or third-parties, nor the I.R.S.'s use of mass circularization letters to obtain information from third-parties. The pre-disclosure remedy sought is one that would only prevent the I.R.S. from including in its mass circularization letters to third-parties the unnecessary fact that the taxpayer is the target of an administrative criminal investigation by the I.R.S (*Barrett* pet., p. 10.) The disclosure of the fact that a taxpayer is under an administrative criminal tax investigation is a disclosure of "return information" as defined in Section 6103(b)(2)(A) and when disclosed multiple times via the use of mass circularization letters, it is unnecessary and is in violation of Section 6103(a).

Where the I.R.S. seeks a federal district court's order to enforce its summons to obtain the addresses of all the taxpayer's customers, clients, or patients so that it can continue mass mailing circularization letters, disclosing to such third-parties that the taxpayer is under an administrative criminal tax investigation, as in *Barrett*, the district court should have the authority to prevent such a gross violation of Section 6103. Preventing such a violation would not deny any information to the I.R.S., either from the taxpayer or anyone else, including the third-party patients; it would only eliminate from the mass circularization letters the unnecessary disclosure that the taxpayer is the target of an administrative criminal tax investigation.

Given the statistical fact that approximately two-thirds of the cases the I.R.S. investigates are not referred for prosecution, taxpayers' reputations may be harmed without any likely benefit to the I.R.S. If a federal district court does not have the jurisdiction, in ordering enforcement of an I.R.S. summons, to condition its order to protect the rights of the taxpayer under investigation, the power to harm the taxpayer's reputation will be put in the hands of the investigating I.R.S. agent, and may be abused by that agent unchecked. This Court should not require federal district courts to merely observe and do nothing about such threatened administrative misconduct where potential harm to taxpayers' reputations exists that violates Congress' stated policy to preserve the confidentiality rights of taxpayers and jeopardizes the voluntary assessment nature of this country's system of taxation.

Too often, mass circularization has meant unnecessary, widespread disclosure that the taxpayer is the subject of a criminal investigation by the Criminal Investigation

Division of the I.R.S. with the result that his or her professional business and personal reputation is substantially and irreparably harmed, despite the fact that the Service ultimately concludes that criminal prosecution is not justified. In such circumstances, a taxpayer whose case ultimately warrants civil adjustment, at most, has been unfairly branded a criminal suspect by the Service. Section 6103, enacted as part of the Tax Reform Act of 1976, forbids this kind of destructive and unnecessary disclosure of uncharged and unproven accusations of criminal conduct whether or not prosecution is recommended or ultimately undertaken.

SUMMARY OF ARGUMENT

The fact that a taxpayer is under criminal investigation by the Service constitutes confidential "return information" as defined in Section 6103(b)(2)(A); disclosure of that fact is authorized only if "necessary in obtaining information" which would not "otherwise [be] reasonably available." Section 6103(k)(6). Disclosure that a taxpayer is under criminal investigation violates Section 6103(k)(6) because it is unnecessary for the I.R.S. to reveal that fact to obtain the information it needs when it interviews or otherwise communicates with third parties, especially when mass disclosures of such fact are made via circularization letters.

The unauthorized disclosure of confidential return information may result in the imposition of criminal sanctions under Section 7213, and can be the basis of a cause of action for damages by an aggrieved taxpayer under Section 7431. However, the possibility of criminal prosecution of an offending I.R.S. agent or a damage suit against the government cannot undo the harm caused

by the unlawful disclosure and do not afford real protection to an injured taxpayer.

Moreover, these statutory civil and criminal sanctions are unavailable where the threat of unauthorized disclosure by the Service has not yet ripened into a violation of Section 6103. Federal district courts, when asked by the Service to order the enforcement of a summons during a criminal tax investigation, do possess the power to condition enforcement of the summons to ensure that the Service will not violate the confidentiality provisions of Section 6103 while the investigation is conducted. To hold otherwise would constitute a serious encroachment on the power of a federal court to control its own process, when an administrative agency, such as the I.R.S., appears to be employing the judicial process for a purpose that threatens important congressionally protected interests of the party under investigation.

The exercise of such power by the district court, upon a proper showing of the need for such conditional enforcement, would not improperly interfere with the I.R.S.'s ability to conduct criminal tax investigations or otherwise fulfill its mission and is fully consistent with Congress' intent to protect taxpayers' confidentiality rights. If district courts, however, are denied the power to enforce an administrative summons conditionally, the protection afforded to taxpayers by Congress against illegal, arbitrary, capricious and abusive conduct by the Service will be sharply diminished.

Accordingly, this case, as well as *Barrett*, presents an issue of compelling public interest and of special significance to those taxpayers who are administratively subjected to a criminal investigation by the I.R.S.

ARGUMENT

A FEDERAL DISTRICT COURT HAS THE POWER TO ENFORCE AN I.R.S. SUMMONS CONDITIONALLY IN ORDER TO PREVENT ABUSE OF ITS PROCESS AND PROTECT THE CONFIDENTIALITY RIGHTS OF THE TAXPAYER

Introduction

Congress did not make the summons power granted to the I.R.S. self-enforcing. The I.R.S. "is given no power to enforce compliance or to impose sanctions for noncompliance." *Reisman v. Caplin*, 375 U.S. 440, 446 (1964). The authority to compel compliance is entrusted to the district courts which have jurisdiction to enforce an I.R.S. summons under Sections 7402(b) and 7604(a). In exercising this authority, a district court is empowered to prevent abuse of its process. It possesses, under well established principles, broad discretion to craft its enforcement order in such a manner and on such terms that the summons for which enforcement is requested serves only purposes permitted by law.

The district court's power to prevent abuse of its process amply embraces the authority to modify a summons to protect a taxpayer's legally recognized interests, including his right to the confidentiality of his return information. If protection of that right, in the judgment of the district court, requires conditional enforcement of the summons, the power of the court to control its own process is broad and flexible enough to authorize such relief.

Disclosure that an Identified Taxpayer is under Criminal Investigation is a Disclosure of Tax Return Information within the Meaning of Section 6103 of the Internal Revenue Code

Before 1977, tax returns were "public records," but were only open to inspection under Treasury regulations approved by the President or under Presidential order. Following the enactment of the Privacy Act of 1974, Congress in 1976 addressed the "unique aspects" of tax returns. Staff of Joint Comm. on Taxation, 94th Cong. 2d Sess., General Explanation of the Tax Reform Act of 1976, 315. Congress concluded that the I.R.S. had more information about citizens than any other federal agency and that other agencies sought access to that information, but that citizens reasonably expected that tax return information they were required to supply to the I.R.S. would be kept private. If the I.R.S. abused that reasonable expectation of privacy, the loss of public confidence would seriously impair the tax system.

Accordingly, Congress amended Section 6103 of the Code to provide that tax returns and tax return information are "confidential" and are not subject to disclosure except in limited situations that the section delineates where disclosure is warranted. *Id.* In the 13 areas disclosure is provided for, Congress "attempted to balance the particular office or agency's need for the information involved with the citizens right to privacy, as well as the impact of the disclosure upon the continuation of compliance with our country's voluntary tax assessment system." *Id.*

In Section 6103, both "return information" and "disclosure" are broadly defined. Return information includes

"a taxpayer's identity . . . whether the taxpayer's return was, is being, or will be examined or subjected to other investigation or processing . . ." 26 U.S.C. § 6103(b)(2). The term "disclosure" is correspondingly broadly defined to mean "the making known to any person in any manner whatever, a return or return information." 26 U.S.C. § 6103(b)(8). It follows that the disclosure to any person that an identified taxpayer is under criminal investigation is a disclosure of return information.

In Section 6103(k)(6), Congress attempted to balance the need for the I.R.S. to obtain information in the course of its official function and the taxpayer's privacy right. The statute permits a criminal investigator, for example, to "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available . . ." Confidentiality is thus required unless the investigative disclosure of certain return information is both (1) necessary and (2) the information sought is not otherwise reasonably available without the disclosure of that return information. For purposes of the confidentiality rule of Section 6103, therefore, the issue regarding the amicus curiae is whether a disclosure that identifies that the taxpayer is under criminal investigation is both necessary to obtain information from witnesses and such information is not otherwise reasonably available from these witnesses without disclosure that the taxpayer is under criminal investigation.

As Judge Brown forcefully noted in his dissent in *Barrett*, there was never any explanation in that case why it was necessary for the agents there who mass circularized letters to the taxpayer's patients to inform them that the taxpayer was under criminal investigation:

> [T]here has been no statement, either from on high in the Solicitor's office or the Department of Justice, or on the lower rungs of the I.R.S. field agents, concerning why it was reasonably necessary to inform the patient interviewees that Dr. Barrett was under criminal investigation. All that the I.R.S. could conceivably want from the inquiry was (i) the amount which the doctor charged the patient for the reconstructive plastic surgery, (iia) the amount that the patient paid, (iib) whether paid in cash or check, and (iii) the amount, if any, paid by an insurer. The fact that Dr. Barrett was facing criminal prosecution and punishment would have nothing to do with those inquiries. In any event, as the revelation was not necessary to obtain information, there is no need to question whether the information was "not otherwise available."

837 F.2d at 1356. It is therefore clear that the unnecessary disclosure of the fact that the taxpayer is under criminal investigation contravenes Section 6103.

The issue presented in this case and in *Barrett* is whether a district court is empowered to enforce an I.R.S. summons conditionally when the facts of a particular case establish the need to prevent further violations of Section 6103's requirement of confidentiality.

The District Court's Role in Summons Enforcement Proceedings

The role of the district court in the enforcement of an I.R.S. summons was initially outlined by this Court in *Reisman v. Caplin*, 375 U.S. 440 (1964). Petitioners in that case, who were the attorneys for the taxpayers under investigation, sought declaratory and injunctive relief against the Service to prevent compliance with a summons issued to an accounting firm employed by

petitioners to assist them in connection with a tax investigation of their clients. It was claimed that the summons improperly demanded production of the attorneys' work product and violated their clients' Fourth, Fifth and Sixth Amendment rights. This Court held that petitioners were not entitled to equitable relief because the statutory scheme created by Congress for the enforcement of an I.R.S. summons provided an "adequate remedy at law." 375 U.S. at 443.

The key elements of this "remedy" are: (1) "both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims"; (2) this same rule applies before a hearing officer, *i.e.* the special agent before whom the summons is initially returnable; (3) an enforcement action filed by the Service "is an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness"; (4) in an I.R.S. summons enforcement proceeding, "the hearing officer has no power of enforcement or right to levy any sanctions"; (5) no penalty may be imposed on a summoned party who appears and interposes good faith challenges to the summons; and (6) "the witness may challenge the summons on any appropriate ground." *Id.* at 445-50.

In sum, the statutory scheme governing enforcement of an I.R.S. summons is valid because it "provides full opportunity for judicial review before any coercive sanctions may be imposed." *Id.* at 450.

The protective function of the district court in summons enforcement proceedings, emphasized in *Reisman v. Caplin*, was underscored in *United States v. Powell*, 379

U.S. 48 (1964), which held that probable cause need not be shown to obtain enforcement of a summons. After discussing the showing required of the Service, this Court stated that such a showing could be nevertheless attacked upon a showing of "abuse of process." As part of its evaluation of whether the summons should be enforced, the district court may "inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Id.* at 58.[2]

The potential for abuse of the summons power was again acknowledged in *United States v. Bisceglia*, 420 U.S. 141, 146 (1975) where Chief Justice Burger stated that "We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse."

The Court again emphasized, however, that the safeguard against such possible abuse is the federal district court which stands between the I.R.S. and the person summoned and which possesses the power to refuse enforcement or *narrow* the scope of the summons:

> Substantial protection is afforded by the provision that an Internal Revenue Service summons can be

2. This Court has not provided a comprehensive definition of "abuse of process." In *Powell*, the Court said: "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S. at 58. The decision in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) suggests that the various statements concerning abuse of process in *Powell* were not meant to be exhaustive: "Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 318. *Accord: SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 314 (5th Cir. 1981); *SEC v. Wheeling - Pittsburgh Steel Corp.*, 648 F.2d 118 (3rd Cir. 1981).

enforced only by the courts. 26 U.S.C. § 7604(b); *Reisman v. Caplin*, 375 U.S. 440, 84 S. Ct. 508, 11 L.Ed.2d 459 (1964). Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell*, 379 U.S., at 58, 85 S. Ct., at 255, 13 L.Ed.2d 112. The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons. See, e.g., *United States v. Matras*, 487 F.2d 1271 (CA 8 1973); *United States v. Theodore*, 479 F.2d 749, 755 (CA 4 1973); *United States v. Pritchard*, 438 F.2d 969 (CA 5 1971); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129 (CA 5 1967). Indeed, the District Judge in this case viewed the demands of the summons as too broad and carefully narrowed them.

Id. at 146-147. The Ninth Circuit in the present case correctly applied these settled principles in concluding that the district court had the authority to restrict the I.R.S. from disclosing documents produced in response to the summons to other governmental agencies unless criminal tax prosecution was sought or a further court order was obtained. *United States v. Zolin*, 809 F.2d 1411, 1416-17 (9th Cir. 1987). As the Court of Appeals observed, this restriction, rather than being an abuse of discretion, was a wise exercise of control over its own process, enabling it to monitor the I.R.S.' use of the summoned documents. *Id.*[3]

3. The apparent need for the restriction was expressed in the Court of Appeal's opinion in the related decision in *United States v. Author Services, Inc.*, 804 F.2d 1520, 1526 (9th Cir. 1986) as follows: "The [District] Court believed its order was necessary because of the many levels of ongoing litigation between the Church and the Government which created 'the real fear that information acquired for one purpose may be in effect used for civil discovery in the other.'" The Court of Appeals also noted that "district courts have broad authority, under 26 U.S.C. § 7402(a), to issue any orders or decrees as may be necessary for enforcement of internal revenue laws." *Id.* at 1525.

In *Barrett*, the Fifth Circuit's *en banc* decision expressly denies the existence of any authority which would permit a district court to enforce a summons conditionally or restrict the I.R.S. in what it does or may do with the summoned information. Indeed, the *Barrett* opinion does not acknowledge any power in the district court even to modify or narrow a summons. The Fifth Circuit's language is sweeping and unequivocal:

> In a summons enforcement proceeding, the district court's only task is to determine whether the summons should or should not be enforced. This inquiry is limited to ensuring that the government has complied with the four *Powell* criteria, and that its process is not being abused. *Powell*, 379 U.S. at 57-58, 85 S. Ct. at 255. There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the I.R.S.

837 F.2d at 1350.

Barrett's severe limitation on the scope of the district court's power in summons enforcement proceedings is

a dramatic departure from the settled principle that "the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise . . ." *Gumbel v. Pitkin,* 124 U.S. 131, 145-46 (1888). The Fifth Circuit's "all or nothing" approach, which denies any "middle ground" in summons enforcement proceedings, is fundamentally at odds with the obligation of the federal courts to apply the *Powell* standard "to fit particular situations" and where necessary, modify a summons to ensure that it serves only legitimate purposes. *Bisceglia, supra,* 420 U.S. at 146. Limiting the district court to enforcing a summons without restriction or denying it in its entirety effectively deprives it of the power to control its own process.

Moreover, the Fifth Circuit's limitation on the district court's power would produce, in some cases, the anomalous result that no information is supplied to the Service because the challenged summons is partially defective, *e.g.* it improperly demands certain information protected from disclosure, *e.g.,* attorney-client communications, *Reisman v. Caplin, supra* 375 U.S. at 449; attorney work product, *Upjohn Co. v. United States,* 449 U.S. 383 (1981); or documents protected by the privilege against self-incrimination, *Fisher v. United States,* 425 U.S. 391 (1976); *United States v. Doe,* 465 U.S. 605 (1984).

The district court cannot effectively discharge its responsibiiity to protect a taxpayer's rights in a summons enforcement proceeding unless it can modify a summons, where necessary, and, based upon the particular facts of the case, "fashion appropriate rules as to the fairness of the enforcement order." *United States v. Friedman,* 532 F.2d 928 (3rd Cir. 1976) (enforcement of summons

may be conditioned on requiring I.R.S. to reimburse summoned third party banks for the reasonable cost of production of the requested bank records). If conditional enforcement is necessary to protect the statutorily guaranteed right of confidentiality, the district court's power and duty to award such relief is no less than its power and duty to protect other rights of taxpayers, such as the attorney-client privilege, work product immunity and the privilege against self-incrimination during summons enforcement proceedings.

Contrary to the Fifth Circuit's conclusion in *Barrett,* conditional enforcement of a summons to protect a taxpayer's rights under Section 6103 would not improperly interfere with the I.R.S.' investigative efforts. There is no reason to believe that summons enforcement proceedings would be unduly burdened if district judges have the power to condition enforcement, when necessary, to protect a taxpayer against unnecessary invasions of his privacy forbidden by Section 6103. The taxpayer would have the burden of demonstrating that conditional enforcement is needed under the particular facts of the case. In the absence of a substantial showing by affidavit or other sworn evidence, *see e.g., United States v. Millman,* 765 F.2d 27 (2d Cir. 1985), that the information sought by the summons is likely to be used in a manner prohibited by Section 6103, or the agents are otherwise likely to act in violation of the statute, conditional enforcement would not be authorized.

Furthermore, as noted in Judge Brown's dissent in *Barrett,* much of the evidence relevant to the determination of whether a summons has a legitimate investigative purpose is likely to be pertinent to the determination of whether the disclosure of return information is neces-

sary to obtain information that is otherwise not reasonably available. 837 F.2d at 1356-57. Evidentiary hearings are not granted automatically in summons enforcement proceedings; their infrequent number is not likely to increase substantially if conditional enforcement is recognized as an appropriate judicial tool in such cases.

In those few cases where conditional enforcement is shown to be necessary, it is unlikely that substantial judicial resources would have to be devoted to ensuring compliance by the Service with the order. But if a compliance hearing should occasionally be needed, respect for the court's process and Congress' unequivocal intent to protect taxpayer confidentiality are sufficient reasons to warrant the expenditure of these resources.

A conditional enforcement order would not impede I.R.S. investigative efforts because the summoned documents obtained under a conditional enforcement order could be used by the Service for any purpose permitted under the law. Such an order would not forbid even the mass circularization of the taxpayer's clients, patients or customers where the investigation demonstrates the need to employ that information gathering technique. Conditional enforcement, however, would prevent the unnecessary mass disclosure during an investigation that the taxpayer is under criminal investigation, a privacy right guaranteed by statute.

Unquestionably, Congress intended to deter unnecessary disclosures of confidential information by providing for criminal prosecution of the offending party and a civil damage remedy against the government for an aggrieved taxpayer. However, nothing in Sections 7213 or 7431 suggests that these statutes were intended to deprive the district court of its inherent power and its statutory

authority to prevent abuse of its process when there is a demonstrable threat that the Service intends to pursue its investigation in a manner incompatible with Section 6103.

The government incorrectly argues that Congress did not intend a pre-disclosure remedy for disclosures that would violate Section 6103(k)(6) because of the post-disclosure sanctions of Sections 7431 and 7213 and the pre-disclosure remedy of Section 6110(f)(3). (Govt's brief, p. 34-35.) The government fails to recognize that Section 7431(d) contemplates that a taxpayer will not learn of an illegal investigative disclosure until after it occurs and, therefore, provides a two (2) year limitation period for bringing the civil action under Section 7431 "after the date of discovery by the plaintiff of the unauthorized disclosure." In the entirely different situation of publishing a private letter ruling, where the Service is required to notify the taxpayer in advance of its proposed disclosure, the taxpayer has the right to a pre-disclosure remedy. Section 6110(f)(1), (2), and (3). Therefore, where a taxpayer is fortunate enough to learn in advance of the Service's proposed illegal disclosures during an administrative investigation, such as in *Barrett* and *Zolin*, Congress did not contemplate that a taxpayer would not have a pre-disclosure remedy.

Especially where, as in *Barrett*, the Service seeks a federal district court's order enforcing its summons for the purpose of obtaining information that will allow it to continue making illegal disclosures via mass circularization letters, Congress did not intend that the federal district court would not have the authority to prevent an abuse of its process and the commission of a felony by an employee of the I.R.S. under section 7213. The

government's characterization of Section 7213 as merely a post-disclosure remedy ignores the fact that it expresses Congress' intent that investigative disclosures in violation of Section 6103 constitute criminal felony conduct and Congress clearly did not intend that federal district courts would not have the power to prevent I.R.S. employees from committing such crimes. Recognition of the power in the district court to prevent such crimes is fully consistent with the congressional goal of strengthening taxpayers' confidentiality rights that the Tax Reform Act of 1976 so clearly attempted to accomplish.

The existence of a conditional enforcement order, supported by the district court's power to impose contempt sanctions for its violation, would serve to ensure compliance by the Service with the law which it is obliged to administer faithfully, in circumstances where the facts demonstrate the need for this special condition. The power of the district court to condition its enforcement order is likely to be far more effective in preventing infringement of the right of confidentiality guaranteed by Section 6103 than the prospect of a civil damage action under Section 7431, which may not always fully compensate the loss resulting from the improper disclosure and breach of confidentiality. As Judge Brown noted in his dissent in *Barrett*:

> Even more than litigious frustration, the damage remedy—no matter how extravagant the damage award—cannot undo the harm wrought by the illegal disclosure. Here, revealing that the doctor is under criminal investigation is of irreparable damage to his personal and professional reputation. Congress, in furtherance of its goal of strengthening the rights of taxpayers, intended that taxpayers should not be exposed to such damning, untried, unproved accusations.

United States v. Barrett, supra, 837 F.2d at 1357.

This Court's decision in *Fuentes v. Shevin,* 407 U.S. 67, 81 (1972) establishes that due process requires a hearing before the government may act to deprive a person of his property and that such a hearing "must be granted at a time when the deprivation can still be prevented." Even though damages may later be awarded for the wrongful deprivation, "no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 82. As the Court of Appeals for the District of Columbia has said, a "damage remedy *after* the information is released fails to protect [the] right to confidentiality." *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983) (emphasis in original).

Furthermore, granting a pre-disclosure remedy to taxpayers in the form of a conditional enforcement order would serve to reduce the government's exposure to unnecessary liability for damages,[4] reduce the cost of litigation to the government and to taxpayers and reduce the burden on the federal court system of actions brought under Section 7431.

This Court has not been inclined to impose restraints on the breadth of the Service's summons authority granted by Congress " 'absent unambiguous directions from Congress.' " *United States v. Arthur Young & Co.,*

4. The amount of minimum liquidated damages under Section 7431 of $1,000 per disclosure alone can result in substantial damages. In *Barrett*, for example, the special agent mailed at least 350 separate letters to the taxpayer's patients, thereby exposing the public treasury to a minimum of $350,000 in damages.

465 U.S. 805, 816 (1984) (quoting *United States v. Bisceglia*, 420 U.S. 141, 150 (1975)); *United States v. Euge*, 444 U.S. 707, 715 (1980). The Tax Reform Act of 1976, which enacted a stringent code of confidentiality and Section 6103(k)(6), are precisely such "unambiguous directions from Congress" that justify recognition of a district court's power to enforce a summons conditionally when the circumstances warrant such relief.

CONCLUSION

In view of the foregoing, the amicus curiae submits that this Court, in deciding the present case and *Barrett*, should hold that a federal district court has the power to enforce an I.R.S. summons conditionally in order to prevent violation of a taxpayer's confidentiality rights under Section 6103.

Respectfully submitted,

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APPENDIX

INTERNAL REVENUE MANUAL — Administration

INVESTIGATIVE PROCEDURE

P-9-29 (Approved 7-24-79)

Investigative policy

All criminal investigations should be started and concluded as expeditiously as possible. They should be conducted impartially and thoroughly to obtain all critical information and evidence. Duplication in investigations, unnecessary inconveniences to the public and unnecessary embarrassment to the taxpayer should be avoided. Appropriate courtesies should be shown when soliciting information.

All investigations should be terminated when sufficient evidence to convict has been accumulated and there are no reasonable grounds to expect that further investigation may produce significant results in relation to the available evidence and to the additional investigative time and effort involved. All who are implicated in a crime will be sought out and definitive evidence obtained as to their implication, to the extent reasonable. Investigations of lesser prosecution potential should be closed when effective use of resources requires that the staffing to complete such cases should be applied to other cases having greater potential to enhance voluntary compliance.

P-9-35 (Approved 9-3-87)

Legal rights of persons investigated to be observed

The Internal Revenue Service is charged with responsibility for administering internal revenue laws with uniform

fairness and impartiality. A vigorous enforcement effort is necessary to bring to justice willful offenders of tax laws. At the same time, the integrity of Service personnel in respecting and observing the constitutional and other legal rights of all persons being investigated must be maintained. The methods which the Service will use in investigating alleged violations of law may vary with the circumstances, but will in all respects stay within the bounds of the law.

9382 (2-22-77)

Conduct Standards for Special Agent During Investigations

9382.1 (2-8-79)

General

(1) *Impartial*—A special agent should be impartial in all investigations conducted. He/she must not be influenced by political, racial, or religious considerations. He/she should avoid a mental attitude of attempting to "get" persons who are under investigation. He/she must so conduct himself/herself as to make it apparent to all persons connected with the case that his/her investigation is completely impartial.

(2) *Thorough*—A special agent should be thorough in all investigations conducted. It is his/her duty to obtain all the pertinent facts, both favorable and adverse, regardless of the conclusions that may be later formed from consideration of them. He/she should exercise initiative and zeal, but should avoid the appearance, in either action or speech, of being overzealous.

(3) *Tactful*—A special agent should be tactful in all investigations conducted. He/she must avoid making any remarks or acts during or following the investigation which are likely to be misinterpreted.

(4) *Discreet*—A special agent should be discreet in all investigations conducted. He/she must not make statements or ask questions that will divulge information which would tend to jeopardize the successful conclusion of the investigation. He/she must not unnecessarily injure the reputation of the person being investigated.

(5) *Official Rules of Conduct*—The minimum standards of conduct for employees of IRS published in Chapter 735, Treasury Personnel Manual, and in IRM 0735.1, Handbook of Employee Responsibilities and Conduct, contain additional guidelines for the conduct of official Government business which must be scrupulously observed by special agents.

(6) *Report Urgent Developments*—Each special agent will immediately notify his/her group manager (or, when the group manager is not available, the next highest official available) of any unusual developments or situations that occur during the course of an investigation during regular or irregular duty hours, such as participation in any investigative activity with other enforcement agencies. (see 9451.2:(3)) Group managers should be notified in advance of taking any action since legal issues may be involved which management officials may wish to discuss with Counsel before any actions are taken.

347 (1-18-80)

Circular Form Letter

347.1 (9-8-80)

General

Mail circularization is a written request to third parties for information where more than ten letters of a similar

nature are sent. Mail circularization to obtain third party evidence may be, under certain circumstances, the most practical means of obtaining documentary evidence in an investigation when a large number of persons, widely scattered geographically, need to be reached. If not judiciously used, mail circularization may result in unwarranted embarrassment to the taxpayer or cause unfavorable public reaction, thus subjecting the Service to criticism.

347.2 (7-7-88)

Procedure

To ensure proper use of this technique, mail circularization will not be undertaken in any case without the prior approval of the Chief, Criminal Investigation Division, including approval of the letters to be sent out. Care must be exercised in approving mail circularization to ensure that mail inquiries are sent only to those third parties who, in the view of the Chief, Criminal Investigation Division, are a likely source of information; the information sought is important to the investigation; and obtaining the information by other means, if at all possible, would not be practical because of either delays in investigation, costs involved, or similar reasons. Caution must be exercised not to damage the reputation of the taxpayer by making the letter either offensive or suggestive of any wrongdoing by the taxpayer. It *must not* be disclosed in the body of the letter that the taxpayer is under investigation by the Criminal Investigation Division. Appropriate wording could be "The Internal Revenue Service is conducting an investigation of . . .". Any reference to the Criminal Investigation Division must be restricted to the signature blocks or ancillary

headings. When mailing circularizations, all such letters will be signed by the special agent with prior approval of the Chief, Criminal Investigation Division, indicated on the file copy. The title "Special Agent" and Criminal Investigation Division will be included in the signature block.

347.2 (9-8-80)

Procedure

To ensure proper use of this technique, mail circularization will not be undertaken in any case without the prior approval of the Chief, Criminal Investigation Division, including approval of the letters to be sent out. Care must be exercised in approving mail circularization to ensure that mail inquiries are sent only to those third parties who, in the view of the Chief, Criminal Investigation Division, are a likely source of information; the information sought is important to the investigation; and obtaining the information by other means, if at all possible, would not be practical because of either delays in investigation, costs involved, or similar reasons. Caution must be exercised not to damage the reputation of the taxpayer by making the letter either offensive or suggestive of any wrongdoing by the taxpayer. Appropriate wording could be "The Internal Revenue Service is conducting an investigation of . . .". When mailing circularizations, all such letters will be signed by the special agent with prior approval of the Chief, Criminal Investigation Division, indicated on the file copy. The title "Special Agent" and Criminal Investigation Division will be included in the signature block.

348 (1-18-80)

Disclosure

348.1 (1-17-83)

General

All returns and return information are confidential and may not be disclosed except as authorized by the Internal Revenue Code. This rule applies to all present and former IRS employees. Civil and criminal sanctions may be imposed upon intentional violators. Effective with respect to disclosures made after September 3, 1982, civil actions for damages are permitted against the Government rather than against the employee.

348.2 (4-9-84)

Disclosure Definitions

(1) A "return" is any tax return or information return, schedules, and attachments thereto, including any amendment or supplement, which is required or permitted to be filed and is in fact filed by a taxpayer with the Secretary of the Treasury. Examples include:

(a) Forms 1040, Schedules A, B, C and Forms W-2.

(b) A taxpayer has filed an income tax return and subsequently submits a letter to IRS explaining an item on the original return. The letter is within the definition of return.

(2) The statutory definition of "return information" is very broad. It includes any information other than a taxpayer's return itself which IRS has obtained from any source or developed through any means which relates

to the potential liability of any person under the Code for any tax, penalty, interest, fine, forfeiture or other imposition or offense. It includes information extracted from a return, e.g., the names of dependents, locations of business interests, bank accounts, etc. Examples include:

(a) The fact that a person has filed a return or is under investigation is recorded in IRS files.

(b) The fact that the Service has copies of public records maintained in its files which were secured from a county clerk's office pursuant to an investigation of a taxpayer.

(3) "Taxpayer return information" is return information which is filed with or furnished to the IRS by or on behalf of the taxpayer to whom the return information relates. This includes, for example, data supplied by a taxpayer's representative (e.g., his accountant) to the IRS in connection with an audit of his return.

(4) Disclosure is the making known of returns or return information in any manner. A disclosure may be either direct or indirect. Discussing specific facts of a case you are working on with your supervisor is a disclosure although clearly a proper one.

(5) Tax Administration includes the enforcement of not only the Internal Revenue Laws, but also the enforcement of other related Federal Statutes where such enforcement is done in connection with the administration of tax laws.

348.3 (1-18-80)

Disclosures for Investigative Purposes

Special agents are specifically authorized by IRC 6103(k)(6) to disclose return information to the extent necessary to gather data which may be relevant to a tax investigation. Situations in which special agents may have to make such disclosures in order to perform their duties arise on a daily basis. For example, this occurs whenever they contact third parties believed to have information pertinent to a tax investigation. IRC 6103(k)(6) permits the disclosure of return information in the investigation process but does not authorize the disclosure of returns themselves. They may be disclosed during the investigation process only to their preparer. When soliciting information from a third party other than a return preparer during a tax investigation, a special agent may not show a taxpayer's tax return to the third party. However, pertinent data (e.g., the nature and amount of income, deductions, expenses, etc.) may be extracted from the tax return and used in questions to third parties.

INTERNAL REVENUE CODE

The subsections of I.R.C. § 6103 relevant to this Petition are 6103(a), 6103(b), and 6103(k)(6) are set forth below:

Sec. 6103. *Confidentiality and Disclosure of Returns and Return Information.*

[Sec. 6103(a)]

(a) GENERAL RULE.—Returns and return information shall be confidential and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection the term "officer or employee" includes a former officer or employee.

[Sec. 6103(b)]

(b) DEFINITIONS.—For purposes of this section—

(1) RETURN.—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION.—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined

in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) TAXPAYER RETURN INFORMATION.—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) TAX ADMINISTRATION.—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or pro-

posed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) STATE.—The term "State" means—

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, and

(B) for purposes of subsection (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality—

(i) with a population in excess of 2,000,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) TAXPAYER IDENTITY.—The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) INSPECTION.—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) DISCLOSURE.—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) FEDERAL AGENCY.—The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) CHIEF EXECUTIVE OFFICER.—The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

[Sec. 6103(k)]

(k) DISCLOSURE OF CERTAIN RETURNS AND RETURN INFORMATION FOR TAX ADMINISTRATION PURPOSES.—

(6) DISCLOSURE BY INTERNAL REVENUE OFFICERS AND EMPLOYEES FOR INVESTIGATIVE PURPOSES.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

[Sec. 7213]

Sec. 7213. *Unauthorized Disclosure of Information.*

[Sec. 7213(a)]

(a) RETURNS AND RETURN INFORMATION.—

(1) FEDERAL EMPLOYEES AND OTHER PERSONS.—It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) STATE AND OTHER EMPLOYEES.—It shall be unlawful for any person (not described in paragraph (1)) willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under subsection (d), (i)(3)(B)(i), (l)(6), (7), (8), (9), (10), or (11), or (m)(2) or (4) of section 6103. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or

imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(3) OTHER PERSONS.—It shall be unlawful for any person to whom any return or return informaiton (as defined in section 6103(b)) is disclosed in any manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of the paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) SOLICITATION.—It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(5) SHAREHOLDERS.—It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punishable by a fine in any amount not to exceed $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

[Sec. 7213(b)]

(b) DISCLOSURE OF OPERATIONS OF MANUFACTURER OR PRODUCER.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

[Sec. 7213(c)]

(c) DISCLOSURES BY CERTAIN DELEGATES OF SECRETARY.—All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

[Sec. 7213(d)]

(d) CROSS REFERENCES.—

(1) PENALTIES FOR DISCLOSURE OF INFORMATION BY PREPARERS OF RETURNS.—For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) PENALTIES FOR DISCLOSURE OF CONFIDENTIAL INFORMATION.—

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

JURISDICTION OF DISTRICT COURTS

[Sec. 7402]

Sec. 7402. (a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) FOR DAMAGES TO UNITED STATES OFFICERS OR EMPLOYEES.—Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or em-

ployee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(d) [Repealed by P.L. 92-310]

(e) TO QUIET TITLE.—The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) GENERAL JURISDICTION.—

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of Title 28 of the United States Code.

[Sec. 7431]

Sec. 7431. *Civil Damages for Unauthorized Disclosure of Returns and Return Information.*

[Sec. 7431(a)]

(a) IN GENERAL.—

(1) DISCLOSURE BY EMPLOYEE OF UNITED STATES. —If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) DISCLOSURE BY A PERSON WHO IS NOT AN EMPLOYEE OF UNITED STATES.—If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against such person in a district court of the United States.

[Sec. 7431(b)]

(b) NO LIABILITY FOR GOOD FAITH BUT ERRONEOUS INTERPRETATION.—No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

[Sec. 7431(c)]

(c) DAMAGES.—In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) the greater of—

(A) $1,000 for each act or unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of—

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the cost of the action.

[Sec. 7431(d)]

(d) PERIOD FOR BRINGING ACTION.—Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

[Sec. 7431(e)]

(e) RETURN; RETURN INFORMATION.—For purposes of this section, the terms "return" and "return information" have the respective meanings given such terms in section 6103(b).

[Sec. 7431(f)]

(f) EXTENSION TO INFORMATION OBTAINED UNDER SECTION 3406.—For purposes of this section—

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.